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NO. 81-154

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

DONALD B. RICE TIRE COMPANY, INC.,

Petitioner,

v.

MICHELIN TIRE CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR RESPONDENT

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Questions Presented

1. Did the respondent tire manufacturer have the right under Section 1 of the Sherman Act to require its contractually authorized dealers to service the tires they had purchased from respondent and resold?

2. Should this Court disturb the findings of the District Court that the petitioner tire dealer was a "free-rider" who had prospered by failing to service and promote the sales of respondent's tires in accordance with respondent's reasonable requirements for all of its dealers?

3. Did the evidence establish that the nonrenewal of the "free-riding" petitioner as a dealer was anticompetitive?

4. Do the petitioner's cited authorities demonstrate a conflict between any other Court of Appeal's decision and the Court of Appeal's decision herein upholding the petitioner's nonrenewal because it was a "free-rider"? Do they otherwise require this Court to exercise its power of supervision?

5. Is there evidence to support the District Court's finding that respondent's decision not to renew petitioner's dealership was a consequence of a combination between the respondent and some of its other dealers?

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* On or about March 20, 1980, the respondent filed in the United States Court of Appeals for the Fourth Circuit a disclosure of corporate affiliation and financial interest, stating that it is an indirect subsidiary of a French commanditory partnership. The latter has certain corporate powers and attributes, but is not, as far as respondent's attorneys are aware, a corporation within any common law or statutory concept recognized in the United States.

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BRIEF FOR RESPONDENT

Statement of the Case

In November 1977, the respondent Michelin declined to renew the petitioner Rice's one-year "Dealer Sales Agreement" ("DSA") because, as the District Court found, and the Court of Appeals affirmed, Rice was a "free-rider," who had chosen to violate Michelin's reasonable contractual requirements that its dealers promote and

service its tires. Rice had perceived that it could greatly increase its sales and profits on Michelin tires by refusing to provide the full promotion and servicing that Michelin required of its dealers, while simply taking the utmost advantage of the demand created by the efforts of Michelin and its other dealers through full promotion and servicing of tires.

In January 1978, Rice sued Michelin under the Maryland antitrust act in the Circuit Court of Frederick County, Maryland. The respondent removed the case to the United States District Court. A year later, in January 1979, Rice served an amended complaint, in which it alleged a violation of Section 1 of the Sherman Antitrust Act and omitted any references to the Maryland act. The case was tried to the Court without a jury in November 1979, and the District Court, Joseph H. Young, U.S. D.J., entered judgment for Michelin. (6a*). Appeal, affirmance and denial of rehearing followed as set forth in the petition.

In rendering judgment the District Judge found as a fact that Michelin had determined not to offer Rice a 1978 dealership because, as the evidence established, Rice had been a free-rider, who "did not bear its fair share of the costs of promoting and servicing Michelin tires." (18a). He also found that Rice's nonrenewal had been "necessary to prevent free-riding by retailers on the services provided by other dealers" (*id.*) and went on to find further that "Michelin reasonably could have determined that nonrenewal of major wholesalers [of which Rice was one] was necessary to ensure provision of point-of-sale services." (23a). The District Judge also found that "The evidence suggested a number of ways in which

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* References so indicated are to the petition for certiorari.

[Rice] was free-riding on the promotional efforts of others." (19a).

These findings are predicated on further detailed and painstaking findings and analyses from technical and tire performance standpoints regarding the necessity for the dealer's servicing of Michelin tires (18a-22a), the reasonableness of Michelin's requirements that its dealers promote and service its tires (*id.*) and Rice's flagrant and admittedly profit-motivated determination to disregarded deliberately its obligations to promote sales and provide services that it had contractually assumed by its Michelin DSA. (19a, 21a).

As a distinctly separate and discrete basis for rejecting all of Rice's claims and granting judgment for Michelin, entirely unrelated to and disconnected from Rice's "free-riding," the courts below held that Rice had "failed to meet its burden of establishing that [Michelin's] actions had anticompetitive consequences." (27a, 3a). The lower courts found that "during the later half of the 1970's," which was a period of intensive and ever increasing inflation, the prices in Rice's market area for Michelin passenger car tires not only "declined in relation to those of other manufacturers," but actually fell "in real dollar terms during the period following plaintiffs' nonrenewal." (*Id.*). In addition the courts below found that Michelin had "deliberately expanded the number of retail outlets authorized to carry its products" (28a), increasing them "from 300 in 1969 to 2,500 in 1977" (9a) while expressly providing that its dealerships were not exclusive. (*Id.*). The District Court correctly concluded that Rice had "failed to show that Michelin's change in distribution strategies had adverse impact on intrabrand competition." (28a).

Rice's petition is perforce silent on every one of these clear and decisive adverse findings. In petitioning for certiorari, Rice implicitly asks this Court to ignore and disregard these findings below because the absence of any evidence to support its case compels it to ignore and disregard them. As a surrogate for the non-existent evidence that might support its contentions, Rice attempts to substitute legal theories that may be perfectly sound in the context in which they were enunciated, but which have no application to the nonrenewal of Rice's free-riding dealership and the subsequent lack of any injury to competition. Consequently, the granting of certiorari would be inappropriate.

Although Rice seems to have explored every difference and distinction in vertical and horizontal combinations, what in effect it urges this Court to do is to hold that a free-rider may with utter impunity flatly refuse to perform a manufacturer's reasonable, procompetitive, pro-consumer contractual requirements for promoting and servicing its product so that the free-rider may reap where only other dealers competing with him have sown their own promotional and servicing expenditures. For, says Rice, if any such competing dealer should complain that he has incurred promotional and servicing expenses where the free-rider has none, the manufacturer's non-renewal of the free-rider would constitute an unlawful combination in restraint of trade. In other words, Rice argues that unless the manufacturer offers the free-rider a further dealership contract that the free-rider has no intention of performing, the free-rider should be awarded treble damages for his nonrenewal, presumably including three times the aggregate prospective increase in future profits flowing from his intentional, continuing breach of contract by refusing to promote and service the product.

The inquiries of the courts below into restraints and injuries to competition as elements of a Section 1 Sherman Act violation are predicated upon the existence of a contract, combination or conspiracy to eliminate Rice's Michelin dealership. (3a, 7a, 11a). In this one respect, Michelin must take sharp issue with the findings of the courts below and the holdings predicated upon them. The District Court erroneously found that Duleyrie, Michelin's vice president sales, had "conceded that complaints . . . from other tire dealers . . . contributed to the decision . . . not to renew Rice's dealership." (11a). For this finding there is not a shred of evidence, even by the most forced interpretation and inference.

Further, the District Court said that "Numerous other witnesses testified that other tire dealers complained to Michelin personnel about [Rice's] activities." (*Id.*). Two Michelin salesmen testified to having heard dealer complaints about Rice. The only other testimony as to complaints about Rice came from its president, Kenneth Rice, who made two highly conflicting statements about the nature of the compaints and how he had heard of them from a Michelin employee. It requires more than competitors' complaints about another to establish the existence of a conspiracy.

Summary of Argument

Section 1 of the Sherman Act does not prohibit a manufacturer from imposing on its dealers reasonable requirements of promoting and servicing the manufacturer's product, and it does not require a manufacturer to continue to sell its product to a dealer who does not promote it and service it notwithstanding his contractual obligation to the manufacturer to do so.

Rice was a "free-rider" who sold Michelin tires without performing the promotional and servicing functions that he had agreed to perform in his DSA with Michelin. The latter's servicing requirements were reasonably necessary for the proper performance and reputation of the tire, and consequently were reasonably and directly related to interbrand competition. Rice's failure to service and promote the Michelin tire was inimical to Michelin's competitive position and its ability to attract dealers who would promote and service it, and accordingly increase interbrand competition. Michelin's decision not to renew Rice as a free-riding dealer was, therefore, not in violation of Section 1 of th Sherman Act.

Rice presented no evidence to indicate that the nonrenewal of its dealership was related to any conduct that would constitute a *per se* violation of Section 1 of the Sherman Act. Accordingly it had the burden of showing that its nonrenewal had constituted an injury to competition, but this it failed to do. The number of Michelin dealers increased tremendously in the decade of Rice's nonrenewal, and the prices of its tires actualy declined in Rice's market after Rice was no longer a Michelin dealer. Thus this case is particularly inappropriate for granting a writ of certiorari.

Rice has failed to demonstrate that the Fourth Circuit Court of Appeals adopted an analysis of the present case conflicting with the rule applied by any other Court of Appeals or by this Court. It has moreover recommended an analysis entirely inappropriate to the facts of this case.

Although this Court's so-called "two-court rule" ordinarily operates to preclude review of "concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error," exactly such

an error exists here in the finding of a combination. The District Court expressly found that Michelin's vice president in charge of sales had "conceded that complaints from . . . other tire dealers . . . contributed to the decision" not to renew Rice. (11a). There is no basis for this erroneous finding. Without it there is no evidence to support the finding of a combination. Without a contract, combination or conspiracy there can be no violation of Section 1 of the Sherman Antitrust Act. On this ground standing alone, the result reached by the courts below should be affirmed. There is no evidence to show that Rice's nonrenewal was a result of a contract, combination or conspiracy.

ARGUMENT

I. The holdings of the Courts below that the respondent's restraints on its dealers and its non-renewal of petitioner's dealership were reasonable within Section 1 of the Sherman Act are in accordance with law and fully supported by the District Court's findings.

The District Court unequivocally determined that Michelin decided not to renew Rice's dealership for legitimate business reasons, based principally on its finding that Rice was a "free-rider" on the promotional and servicing activities of other dealers. (18a). In essence, the District Court found that by deliberately withholding expenditures for a proportional share of its revenues on promotion and service, Rice was able to utilize the promotion and service facilities of other dealers as a mechanism for underwriting its own wholesaling operation and as a method for undercutting those same dealers who actually bore the expense and burden of promotion and service.

(19a). In brief, the District Court concluded: "The evidence suggested a number of ways in which plaintiff was free-riding on the promotional efforts of others." (*Id.*).

Michelin's decision not to renew Rice was necessary to inhibit potential free-riding by other dealers on the promotion and services provided by competing Michelin dealers. As the District Court observed: "Failure to impose such sanctions would induce dealers to decrease the amount of services offered in order not to be undersold by free-riding dealers." (18a).

In applying the "free-rider" rationale, the District Court made extensive and detailed findings of fact which in effect remove Michelin's decision not to renew Rice from antitrust scrutiny, in that the Court's findings substantiate the reasonableness of Michelin's non-price vertical restrictions and its nonrenewal of Rice.

First, the District Court found that "[defendant's] evidence established that plaintiff did not bear its fair share of the cost of promoting and servicing Michelin tires." (18a). These requirements of promotion and service are found in the dealer sales agreements ("DSA's") signed by Michelin dealers. (22a). They are essential elements of Michelin tires' reputation for superiority, durability and performance. As to the latter, many witnesses, both Michelin's and Rice's, testified in the District Court as to the importance of servicing to the performance of the tire. (20a-21a). To maintain and ensure the performance and reputation of Michelin tires, the DSA's signed by Rice required that the dealer "render prompt, workmanlike and courteous service with respect to Michelin Products including all services to which a purchaser of a Michelin Product from any authorized Michelin source may be entitled." (21a).

On the evidence presented to it, the District Court concluded that "Michelin had a legitimate interest in ensuring that tires were sold by dealers who could provide these specialized services." (*Id.*). The Court further stated that the evidence concerning Rice's facilities established that the volume of services performed therein was "not commensurate" with the volume of Michelin tires it sold. (*Id.*). The Court noted: "This fact was conceded to be a function of plaintiff's wholesaling activities." (*Id.*)

The District Court further buttressed the reasonableness of Michelin's promotion and service requirements with legal and economic authority to the effect that dealers will not offer point-of-sale services if they are compelled to compete with those who do not provide such services, unless manufacturers impose vertical restraints requiring them. (22a). These problems arise in markets where it is almost impossible to induce customers not to purchase products from outlets that offer the cheapest prices but no services, products which they then take to another dealer to be serviced. As to this, the District Court found that "The evidence at trial established that plaintiff's sales to unauthorized dealers were creating such problems." (22a). The main problem for Michelin was that those unauthorized dealers were not bound by Michelin DSA's obligating them to "vigorously and agressively promote the retail sales of Michelin Products." (19a). Consequently, customers who purchased Michelin tires from unauthorized dealers who were not obligated to service the tires would have to resort to authorized dealers to obtain service, a result which was greatly resented by the authorized dealers and led the District Court to conclude that free-rider problems did indeed exist. (22a).

Because of the problems created by sales to unauthorized dealers, the District Court determined that "Mich-

elin reasonably could have determined that nonrenewal of major wholesalers was necessary to insure provision of point-of-sale services" (22a-23a), and it was only to dealers with service facilities that Michelin granted DSA's. (21a). Because of Rice's immense twenty-fold expansion of its business through wholesaling (7a), the District Court found that by the time of its nonrenewal, its services were no longer "commensurate with the volume of Michelin tires [it] sold." (21a). In the context of increasing competition from other tire manufacturers, Michelin's concern for the promotional efforts of its dealers was acute, and ultimately led to a change in its discount policy to require an expenditure of three percent in advertising to entitle a dealer to a quantity discount. (20a).

By disregarding its promotional and service obligations under its DSA, Rice jeopardized Michelin's legitimate business interests and compelled its decision not to reappoint Rice.* *See Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 54-57 (1977); *see also Oreck Corp.* v. *Whirlpool Corp.*, 579 F.2d 126, 132 (2d Cir.), *cert. denied*, 439 U.S. 946 (1978). In fact, it is broadly recognized that the elimination of "free-riding" dealers such as Rice would promote, not suppress, competition. *See Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. at 55; *State* v. *Lawn King, Inc.*, [1979-2] Trade Cas. (CCH) ¶ 62,800, at 78,656 (N.J. Super. Ct. App. Div. 1979);

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*Even if, contrary to the evidence, Michelin had adopted a policy of never selling to wholesalers, this would be legal under the antitrust laws. *See United States* v. *Colgate & Co.*, 250 U.S. 300 (1919); *Aladdin Oil Co.* v. *Texaco, Inc.*, 603 F.2d 1107, 1114-15 (5th Cir. 1979) (extensive discussion of Colgate doctrine and cases applying it); *see also* the "avalanche of precedents" cited in *GTE Sylvania Inc.* v. *Continental T.V., Inc.*, 537 F.2d 980, 997 (9th Cir. 1976), *aff'd*, 433 U.S. 36 (1977) (manufacturer may grant exclusive retail distributorship).

see also Posner, The Rule of Reason and the Economic Approach, 45 U. Chi. L. Rev. 1, 12, 19-20 (1977); R. Posner, Antitrust 554-55 (1974); R. Posner, Antitrust Law: An Economic Perspective 148-50 (1976).

The Court of Appeals for the Fourth Circuit unanimously agreed with these abundant and incontestable findings of fact by the District Court, holding that "the restraints were for the purpose of promoting interbrand competition" and thus reasonable within Section 1 of the Sherman Act. (3a). This Court should not disturb the decision of the Fourth Circuit, which was based on facts that lead to the inescapable conclusion that the restraints imposed by Michelin and its decision not to reappoint Rice were reasonable.

As this Court has previously stated:

> A court of law, such as this court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.

Graver Tank & Manufacturing Co. v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949); *see also, Branti* v. *Finkel*, 445 U.S. 507, 526 n. 6 (1980):

> In view of our settled practice of accepting, absent the most exceptional circumstances, factual determinations in which the District Court and the Court of Appeals have concurred, we decline to review these and other findings of fact petitioner argues were clearly erroneous.

Accordingly, the granting of certiorari is inappropriate.

II. The petition should be denied because petitioner failed to meet its burden of showing that nonrenewal of its dealership had an anticompetitive effect.

In order to prevail in any antitrust action, the plaintiff must substantiate an antitrust injury, "which is to say injury of the type the antitrust laws were intended to prevent. . . ." *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 490 (1977). In order to prove an antitrust violation arising from vertical restraints, the plaintiff must satisfy the rule of reason standard. As the Fifth Circuit noted:

> [The] rule of reason standard hinges the ultimate legality of a restraint on whether the plaintiff has demonstrated an anticompetitive effect which is not offset by a need to achieve a procompetitive benefit or justification.

Kestenbaum v. *Falstaff Brewing Corp.*, 575 F.2d 564, 571 (5th Cir. 1978), *cert. denied*, 440 U.S. 909 (1979), *citing United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365, 380-82 (1967), *overruled in part, Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36 (1977). After applying the rule of reason test, the District Court expressly found that Rice totally failed to demonstrate an adverse effect on either intrabrand or interbrand competition in the passenger or truck tire market. (26a-27a).

Although it relied on statistical figures for the national market in determining whether Michelin had "market power," the initial inquiry in a rule of reason case, the District Court found the relevant geographic market to be the Baltimore-Washington area. (16a, 26a). The District Court found that Michelin did not have market

power based on testimony that Michelin's share of the national radial passenger tire market was 7.9% in 1977 and its share of the national radial truck tire market was approximately 20-25%. (26a). The Court found no anticompetitive effect on retail prices or intrabrand competition in the Baltimore-Washington market stemming from Michelin's dealer requirements. (27a). In sum, the District Court determined (28a):

> [T]he vertical restraints imposed by Michelin were reasonably necessary to meet the fierce competition from other producers of radial tires and the plaintiff failed to show that Michelin's change in distribution strategies had adverse impacts on intrabrand competition.

In determining that Michelin did not possess market power, the District Court followed recognized antitrust guidelines. A review of the District Court's opinion indicates that it based its analysis on market share, competitive conditions and prices, before and after the conduct of which Rice complained. *See Board of Trade of City of Chicago* v. *United States,* 246 U.S. 231, 238-39 (1918); *see also H&B Equipment Co.* v. *International Harvester Co.,* 577 F.2d 239, 243 (5th Cir. 1978); *Northwest Power Products, Inc.* v. *Omark Industries Inc.,* 576 F.2d 83, 89 (5th Cir. 1978), *cert. denied,* 439 U.S. 1116 (1979); *Oreck Corp.* v. *Whirlpool Corp.,* 579 F.2d 126, 130 n.5 (2d Cir.) *cert. denied,* 439 U.S. 946 (1978); *Kestenbaum* v. *Falstaff Brewing Corp.,* 575 F.2d 564, 572 (5th Cir. 1978), *cert. denied,* 440 U.S. 909 (1979).

The District Court's finding that Rice failed to demonstrate any anticompetitive effects of its termination was based on ample evidence of continuing dealer competition both at the wholesale and retail level, which could

not be surmounted by the "impressionistic" evidence offered by Rice that dealers who bought from it reduced their retail prices. (27a).

In the well-known words of Chief Justice Warren, the antitrust laws were enacted for "the protection of *competition,* not *competitors.*" *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 320 (1962) (emphasis in original). Rice completely failed to meet its burden to produce any evidence establishing any anticompetitive effect in the relevant market due to Michelin's non-price vertical restraints, a failure duly recognized by the District Court (27a) and the Fourth Circuit. (2a). This simple finding of fact, that there was no anticompetitive effect resulting from Michelin's restraints or nonrenewal of Rice, renders any further analysis by this Court in this rule of reason setting unnecessary and judicially uneconomical, and so obviates certiorari.

III. The authorities relied upon by the petitioner fail to show that the Court of Appeals' decision is "in conflict with the decision of another federal Court of Appeals," nor does the petitioner claim or show that the decision of the Court of Appeals in any other respect calls "for an exercise of this Court's power of supervision".

In an attempt to circumvent the lower courts' findings of fact, Rice asks this Court to review and find illegal *per se* conduct already closely examined by the District Court and determined to be anticompetitive in neither purpose nor effect. (21a-23a, 27a-28a). Rare indeed is the case where conduct genuinely fit for *per se* categorization is scrutinized and found benign, since "a per se rule reflects the judgment that such cases are not suffi-

ciently common or important to justify the time and expense necessary to identify them." *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 51 n. 16 (1977).

The District Court found that Michelin had decided to handle its wholesaling primarily by itself. (9a). While it is surely unclear why such a decision by a manufacturer, even if taken in "concert" with several dealers, is so inevitably anticompetitive, petitioner urges that the Court's intervention is necessary to resolve a conflict, supposedly created by the decision below, with this Court's decisions and with those of other circuits. (7-9).

To begin with, the resolution Rice advocates would create rather than eliminate conflict with the Supreme Court cases. Rice would have this Court require "horizontal" analysis for non-price resale restrictions wherever a manufacturer distributes to both retailer and wholesaler, regardless of the purpose or effect of the restriction or the nature of the "combination" involved. (*See* 7, 13).

United States v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), *overruled in part, Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36 (1977), concerned mixed or "dual" distribution, and there the Court flatly stated "These are *not* horizontal restraints . . .," 388 U.S. at 372 (emphasis added), and pursued vertical analysis throughout its opinion. That much of the *Schwinn* holding, at least, was respected in the subsequent *Sylvania* decision, 433 U.S. 36, 52 n. 18, and there is no reason to disturb that analysis now.*

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* *See also White Motor Co.* v. *United States*, 372 U.S. 253 (1963) in which the Court treated the restraints as vertical despite a government contention (Brief for the United States at

(Footnote continued on following page)

Moreover, there is no reason to believe disturbing the *Schwinn/Sylvania* approach would affect the outcome of the present case. It should not be assumed that once any facet of a relationship can be characterized as "horizontal," *per se* analysis is mandatory. While in many contexts, "horizontal" and *per se* go together, it is certainly not universally so. There is certain conduct illegal *per se, e.g.*, price-fixing, group boycotts, etc., and it is usually horizontal in nature. But it does not follow that any arrangement with a horizontal aspect is therefore within one of the proscribed categories. Thus, for example, a non-competition covenant ancillary to the formation of a business partnership, while thoroughly horizontal and obviously "anticompetitive" in a sense, is not solely anticompetitive and is evaluated under the rule of reason. *Newburger, Loeb & Co.* v. *Gross*, 563 F.2d 1057, 1082 (2d Cir. 1977). *See also Broadcast Music,*

(Footnote continued from preceding page)

10) that "dual" aspects of the defendant's distribution system made a horizontal approach appropriate. As William F. Baxter, Assistant Attorney General in charge of the Antitrust Division, recently observed:

> The mere fact that a manufacturer achieves a portion of its distribution through wholly-owned channels does not, by that factor alone, convert a vertical case into a horizontal one. A manufacturer may employ dual channels of distribution for a variety of purposes, and only in unusual circumstances does it comport with commercial realities to regard the manufacturers' distribution activities as representing effective horizontal competition with the independent distributor network.

Announcements made by Antitrust Division of the United States Department of Justice on July 8, 1981, TRADE REG. REP. (CCH) No. 498, at 2 (July 13, 1981).

Inc. v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979). Petitioner suggests the presence here of only one such *per se* practice, a horizontal customer allocation scheme. (3, 5). But in support of this characterization it cites only *United States* v. *Topco Associates, Inc.*, 405 U.S. 596 (1972), a case totally dissimilar to this one. In *Topco* it was the conspirators themselves whose relationship was horizontal. The anticompetitive agreement as well as the resulting "restraints" were by design horizontal in purpose and effect. The vertical participant in *Topco* was simply a creature of the horizontal conspiracy, hardly a claim that can be made about Michelin.

Rice, however, argues that this Court's intervention is required because there are what it says are three conflicting tests applied to distinguish what is "horizontal" from what is "vertical": a "source test" (attributed to the Fifth Circuit), a "purpose test" (attributed to the Fourth Circuit) and a "competitive relationship test" (attributed to the Second and Third Circuits and to this Court). (8-9). In point of fact, the "source test" and "purpose test" as applied by the Fourth and Fifth Circuits do not conflict, and the independent "competitive relationship test" expounded by Rice does not (and should not) exist.

The Court below is credited by Rice with having "invented a unique "purpose test." (9). But the Court of Appeals did no such thing. It merely cautioned against any extreme application of the District Court's decision, and, with that "clarification," affirmed "on the basis of [the district] court's searching and well reasoned opin-

ion." (3a).* The clarification was based upon a passage in *Schwinn*, 388 U.S. at 372-73, which in turn was based upon *United States* v. *General Motors Corp.*, 384 U.S. 127 (1966). In *General Motors* a pre-existing combination of dealers had enlisted a manufacturer to act as its enforcement agent in a price-fixing conspiracy aimed at throttling retail price competition. The dealer proposed action was immediately enforced by the manufacturer, but its true "source," if that term is appropriate at all, was the dealer conspiracy. This distinction was recognized in *Sylvania*, 433 U.S. 36, 59 n. 28 (citing *General Motors*). Whether "purpose" is looked upon as an aid in locating the actual "source" or whether different verbal formulations altogether are used, Rice has failed to show choices of inconsistent analyses leading to conflicting decisions, as opposed to merely differing choices of words.** The Fifth Circuit's language that petitioner quotes from *Red Diamond Supply, Inc.* v. *Liquid Carbonic Corp.*, 637 F.2d 1001 (5th Cir. 1981) (10) cannot be read to reject the common approach adopted by *Schwinn*, *Sylvania* and

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* The Court of Appeals never indicated that it would have followed analytical steps different from those followed by the District Court. Its opinion only suggests that it might have labelled identical analytical steps as inquiry about the applicability of the *per se* doctrine rather than as steps in applying the rule of reason. The District Court did not fail to recognize that possibility (12a).

** Rice suggests (9 n. 7) that *Westpoint Pepperell, Inc.* v. *Rea*, [1980-2] Trade Cas. (CCH) ¶ 63,341 (N.D. Cal. 1980), and *Krehl* v. *Baskin-Robbins Ice Cream Co.*, [1979-2] Trade Cas. (CCH) ¶ 62,806 (C.D. Cal. 1979), represent "yet another approach." This "approach" too, of course, is one petitioner opposes, and a reading of the cases indicates neither analysis nor result conflicting with the holdings of the Fourth and Fifth Circuits.

the Court below, given the issues in *Red Diamond* and the Fifth Circuit's acknowledgment that

> occasionally dealers may agree among themselves to have their supplier "impose" restrictions upon them so that an ostensible vertical restraint is in reality a horizontal cartel.

Muenster Butane, Inc. v. *Stewart Co.*, 5 TRADE REG. REP. (CCH) ¶ 64,163 n. 7 (5th Cir. 1981); *see also, Red Diamond*, 637 F.2d at 1005.

To lend the law a chaotic look, petitioner has also concocted a "competitive relationship" test. But it is based upon cases legally irrelevant and factually dissimilar to the one at bar. Two of petitioner's authorities are from the fair trade context. Here the courts merely decide that special statutory protection for resale price-fixing schemes (otherwise illegal regardless of vertical or horizontal characterization) should not be expanded beyond the plain meaning of the statutory text by virtue of some allegedly implicit functional analysis. *United States* v. *McKesson & Robbins, Inc.*, 351 U.S. 305 (1956); *Rubbermaid, Inc.* v. *Federal Trade Commission*, 575 F.2d 1169 (6th Cir. 1978). Two other cases that petitioner cites predate *Sylvania*, rest primarily upon the overruled portion of *Schwinn* and concern clearly defined territorial allocations where the defendant and the plaintiff operated at the same level of distribution as the defendant's co-conspirators: *Pitchford* v. *PEPI, Inc.*, 531 F.2d 92 (3d Cir.), *cert. denied*, 426 U.S. 935 (1976); *Interphoto Corp.* v. *Minolta Corp.*, 295 F. Supp. 711 (S.D.N.Y.) (*Interphoto* also involved price-fixing), *aff'd per curiam*, 417 F.2d 621 (2d Cir. 1969) (the horizontal-vertical question was not before the Sec-

ond Circuit in *Interphoto*).* *American Motor Inns, Inc.* v. *Holiday Inns, Inc.*, 521 F.2d 1230 (3d Cir. 1975), another pre-*Sylvania* case Rice relies upon, did not consider the "dual distribution" question except as linked to a contractual ban on *inter*brand competition. *Id.* at 1253-54. In *United States* v. *CIBA GEIGY Corp.* [1976-1] Trade Cas. (CCH) ¶ 60,908 (D.N.J. 1976), (also pre-*Sylvania*), the defendant again operated at the same level of distribution as its co-conspirators, and, in any event, the court there found a design and intention to suppress horizontal competition (a possibility the fact-finder rejected in the present case (28a)) through defendant drug patentee's misuse of its monopoly position.

Particularly inappropriate are petitioner's citations to *United States* v. *Topco Associates, Inc.*, 405 U.S. 596 (1972) and *United States* v. *Sealy, Inc.*, 388 U.S. 350 (1967). The observations made above in connection with *Topco* (p. 17, *supra*) hold for *Sealy* as well. Both vertical participants, Topco and Sealy, were owned and controlled by the independent distributors with whom they combined. These cases do not call for a result different from the one the Fourth Circuit reached in the instant case, nor can their standards, based upon different factual premises, at all be said to conflict with those invoked by the Court below.

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* A district court opinion cited by petitioners, *Copy-Data Systems, Inc.* v. *Toshiba America, Inc.*, [1979-1] Trade Cas. (CCH) ¶ 62,696 (S.D.N.Y. 1979), does not contain the full explanation of its legal reasoning. *Id.* at 77,900 n. 1. The trial transcript reveals that the judge condemned the dual distributor's restrictions because he found that the restrictions were merely attempts to insulate the dual distributor from competition. Trial Tr. at 559-60. The District Court found in this case, however, that Rice's nonrenewal stemmed from Michelin's desire to insure adequate promotion and point-of-sale services for its tires. (17a-24a, 28a). Moreover, it appears that in Toshiba, a predatory defendant intentionally drove the plaintiff into bankruptcy.

Finally, Rice contends (12-14) that denial of certiorari in this case threatens the underpinnings of all *per se* rules. (Its arguments on that point can be sufficiently answered by reference to *Sylvania* generally and to footnotes 16 and 18 of that opinion particularly.) What petitioner does not consider, however, is that adoption of its position would destroy—for any manufacturer engaged in "dual distribution"—the heretofore settled right* of a manufacturer to replace one distributor with another for legitimate business reasons. "A" is a dual distributor; "A" asks "B" if he would be interested in replacing "C," a sluggish and inefficient wholesaler, and "B" agrees. There is now a "combination" according to petitioner. There is also, under petitioner's analysis, a *per se* violation of the Sherman Act due to the "competitive relationship" between "A," the dual distributor, and "C." Any inquiry into the "purpose" of "C"'s replacement is forbidden under petitioner's theory. Respondent believes this result is self-evidently fallacious and, consequently, unworthy of this Court's attention.

Rice's position demonstrates the danger of the "formalistic line-drawing" this Court has cautioned against in the past. The critical question is not whether conduct might somehow be thought of as coming within the literal terms of the shorthand expression used to describe some *per se* practice. The critical question is whether the conduct is of a kind experience has shown to be irredeemably anticompetitive. *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979) (blanket licensing of musical compositions price-fixing in name

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* *E.g., Byars* v. *Bluff City News Co.*, 609 F.2d 843 (6th Cir. 1979); *Oreck Corp.* v. *Whirlpool Corp.*, 579 F.2d 126 (2d Cir.), *cert. denied*, 439 U.S. 946 (1978); *Joseph E. Seagram & Sons, Inc.* v. *Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970). *See also Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36 (1977).

only); *White Motor Co.* v. *United States,* 372 U.S. 253 (1963) (factual investigation should reveal thoroughly anticompetitive nature before new *per se* category added). Clearly the rule Rice propounds reaches beyond such conduct. Not only has it failed to show genuine conflicts among the circuits, but its proposed inflexible rule is the most unsatisfactory "resolution" possible, particularly on the facts of free-riding found below. This case is not a persuasive candidate for a writ of certiorari.

IV. The District Court's holding that "a combination existed for the purposes of § 1 [of the Sherman Act] between [the respondent] and some of its authorized dealers" is deviod of foundation in the evidence and without suport in law.

In order to reach its conclusion that Michelin's decision not to renew Rice's dealership did "not constitute unilateral action escaping scrutiny under § 1" (7a), the District Court found that

> Jean Pierre Duleyrie, [Michelin's] Vice-President in charge of sales, and the individual primarily responsible for the nonrenewal decision conceded that complaints from . . . other tire dealers about plaintiff's geographically extensive and large-scale wholesaling activities contributed to the decision.

(11a). For this finding there is not a word of supporting evidence. Mr. Duleyrie said nothing of the kind (A 83-87*). The only testimony ever advanced to support this finding is a totally erroneous and unfounded remark in the testimony of Kenneth Rice, petitioner's president:

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* "A" refers to pages in the joint appendix before the United States Court of Appeals for the Fourth Circuit.

> We have first-hand knowedge that dealers have been complaining from Mr. Duleyrie's Deposition. . . .

(A 552). Nowhere in Mr. Duleyrie's deposition did he make any such statement. Petitioner neither included the transcript of the Duleyrie deposition in the appendix to its appeal below, nor did it even attempt to document its president's assertion as to Duleyrie's alleged statement, which Duleyrie never made. There is no evidence that complaints by Michelin dealers about Rice contributed to its nonrenewal. Although there were isolated, vague and generalized dealer complaints about unspecified activities of Rice, there is no evidence that reports of these complaints ever made their way to Michelin management or entered into its decision not to reappoint Rice because it was a free-rider.

As the United States District Court for the Eastern District of Pennsylvania recently held in the course of a careful and detailed analysis, it requires more than evidence of competitors' complaints to establish the existence of a combination or conspiracy. In *Edward J. Sweeney & Sons, Inc.* v. *Texaco, Inc.*, 478 F. Supp. 243 (E.D. Pa. 1979), *aff'd*, 637 F.2d 105 (3d Cir. 1980), *cert. denied*, 101 S.Ct. 1981 (1981), a gasoline dealer whose agreement with Texaco had terminated, brought charges against it of price-fixing and other allegedly unlawful restrictions. The plaintiff's evidence showed that "some Texaco retailers had complained to Texaco that Sweeney's policy of discount pricing was hurting their sales." *Id.* at 255. A former Texaco employee testified he "thought" the termination was due to Sweeney's pricing policy.

On defendant's motion for a directed verdict, the district judge held that:

> To find that Sweeney had introduced sufficient evidence to allow the jury to conclude that Texaco had conspired with other Texaco retailers to fix the retail price of Texaco gasoline I would have to find that competitors' complaints, without more, permit an inference of concerted action. Like numerous courts before me, I hold that evidence of competitors' complaints standing alone cannot support a finding of liability under § 1 of the Sherman Act. *Westinghouse Electric Corp.* v. *CX Processing Laboratories,* 523 F.2d 668 (9th Cir. 1975); *Klein* v. *American Luggage Works, Inc.,* 323 F.2d 787 (3d Cir. 1963); *Carr Electronics Corp.* v. *Sony Corp. of America,* 472 F. Supp. 9 (N.D. Cal. 1979); *Carbon Steel Products Corp.* v. *Alan Wood Steel Co.,* 289 F. Supp. 584 (S.D.N.Y. 1968).

Id. (footnote omitted).

The genesis of the *Sweeney* court's holding is found in its citation to *Carbon Steel Products Corp., supra,* where the court stated:

> A combination violative of Section 1 of the Sherman Act cannot be implied from the fact that some of Wood's customers complained of Carbon Steel's practices, since it was the normal working of the marketplace for them to have done so.

289 F. Supp. at 588.

It is of course fundamental that there cannot be a violation of Section 1 of the Sherman Antitrust Act unless there is a contract, combination or conspiracy. Here there is none, and for that reason alone, entirely apart from all other considerations, the decisions of the court below

should be affirmed. Nothing in the facts of the case, the decisions of the federal courts nor common sense itself suggest good ground for review of the Fourth Circuit's decision. Certiorari should be denied.

CONCLUSION

The Court of Appeals' affirmance of the judgment entered in the District Court is in accordance with the law and fully supported by the findings of fact of the District Court. The petition for a writ of certiorari fails to demonstrate any error or conflict of decision warranting review by this Court, and should therefore be denied.

Respectfully submitted,

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